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## TAXATION OF THE SECOND BANK OF THE UNITED STATES BY OHIO<sup>1</sup>

AFTER the expiration of the charter of the First Bank of the United States in 1811 there was a great increase in the number of state banks, especially throughout the West. In Ohio there were four banks in 1811; by 1815 the number had grown to twelve, and in the following year nine additional banks were incorporated.<sup>2</sup> The charters of these early banks contained no clauses providing for specie payment, and no penalty for suspension, while the power of note-issue was apparently unrestricted. In 1817 additional banks were incorporated, on which for the first time restrictions were imposed; thus in the charter of the Bank of Hamilton it was first provided that the capital should be paid up in "money of the United States"; in that of the Bank of Gallipolis that a certain amount of money, \$20,000, half in specie and half in United States bank-notes, should be on hand before the bank could begin business.<sup>3</sup> At best, however, the business of banking was new, there was little past experience to guide either legislators or bank managers, and many mistakes were made.<sup>4</sup> On the other hand, the conditions in a

<sup>1</sup> In spite of its importance no complete or connected account of this event has ever been written. So far as it has been discussed, it has been treated either as an occurrence primarily of political interest (Turner, *Rise of the New West*, p. 300; McMaster, *History of the People of the United States*, IV. 497-504; King, *Ohio*, p. 336) or of constitutional significance (Ames, *State Documents on Federal Relations*, no. III., p. 5; Story, *Commentaries*, §§ 1649-1655; Cotton, *The Constitutional Decisions of John Marshall*, II. 84). By the people of Ohio who were engaged in the controversy, however, it was regarded almost wholly as an economic and financial question. In so far as they appealed to constitutional principles they did so under the pressure of an economic situation and to justify actions motived by these conditions. While of course such action was not exceptional, the appeal does not necessarily prove conversion to the principles invoked.

<sup>2</sup> Albert Gallatin, *Considerations on the Currency and Banking System of the United States* (Philadelphia, 1831), pp. 100-103. From the figures given by Gallatin of banks which made returns and those which did not we may construct the following table of the number and capital of banks in Ohio between 1811 and 1830:

Date	No. of Banks	Total Capital
1811	4	\$ 895,000
1815	12	1,434,719
1816	21	2,061,927
1820	20	1,797,463
1830	11	1,454,386

<sup>3</sup> W. G. Sumner, *History of Banking in the United States*, p. 92.

<sup>4</sup> D. R. Dewey, *Financial History of the United States*, p. 144.

new and undeveloped country, where capital was scarce and exchange slow, led to the undue expansion of banking credit, which in those days took the form almost entirely of note-issues.

The numerous banks supplied an abundant circulating medium, far in excess of the real needs of the community. The loose credit system of selling public lands also led to bank-note inflation on the part of the local banks; and this was increased after the suspension of specie payments in 1814,<sup>5</sup> by the action of the federal government in accepting state bank-notes in payment for the public lands and other public dues. After the war of 1812, moreover, the western country experienced a "boom" in which Ohio fully shared. "Speculation, stimulated by every incentive, ran into wild and extravagant excesses. Improvements of every kind, under its strong propulsion, advanced with wonderful rapidity."<sup>6</sup> It was a period of inflation, of speculation, and of rising prices, which must ultimately terminate in a financial crash. Things were rapidly verging to this state, when the branches of the Bank of the United States, which had been chartered by Congress in 1816, were established at Cincinnati and Chillicothe. These branches issued their notes in Ohio to a very large amount, and as these were convertible they displaced the issues of the local banks. Consequently there soon developed strong opposition to the Bank in Ohio and also in other states.

Ohio had long been struggling against unauthorized banks, which had flooded the state with depreciated paper, and against agencies of banks chartered by other states, notably Pennsylvania and Kentucky, whose notes, more depreciated than those of the Ohio banks, were driving the latter out of circulation.<sup>7</sup> In the session of 1815-1816, the legislature passed an act imposing a fine of \$1,000 on all persons acting as agents of any bank of issue chartered by the laws of another state; the use of the courts and of the processes of

<sup>5</sup> "The suspension of the payment of specie by the city banks, instantly raised the demand for that article and excited a general distrust of bank paper. The country banks were compelled to close their vaults in self-defence. But the banks of Ohio were among the last to adopt this measure. Such, however, was the confidence of the community in the banking institutions, that the shock to paper credit was soon recovered, and paper passed currently as money, when it was known that it would not at pleasure be converted into specie. An unlimited confidence in bank notes soon diffused itself over the whole country, and banks were originated upon principles as new as they were deceptive and mischievous. An excessive issue of paper currency was the inevitable consequence." Rep. of Com. on Taxing the Bank, *House Journal*, 1819, p. 395.

<sup>6</sup> S. P. Chase, *Ohio Statutes* (Cincinnati, 1833), I. 42.

<sup>7</sup> An act of February 8, 1815, provided that all contracts with persons or firms issuing notes, without being authorized by law to do so, were to be void. Signing or issuing such notes was made punishable by imprisonment for one year and a fine not exceeding \$5,000.

justice were forbidden to all such agencies.<sup>8</sup> This, it will be seen, was ten weeks before the establishment of the Bank of the United States (April 10, 1816), and fourteen months before the organization of the Cincinnati branch.

A year before the organization of the Bank of the United States Ohio had begun the taxation of banks in that state. The quota of the direct tax imposed upon the states by the federal government to help defray the expenses of the war had been paid by Ohio out of taxation, with only a temporary resort to loans. To raise this additional revenue the land tax was greatly increased and new sources of revenue sought out. Among these latter was a tax of four per cent. on its dividends on every banking company in the state.<sup>9</sup> In this and subsequent acts relating to the local banks are to be found practically all the provisions later included in the law taxing the branches of the Bank of the United States, showing that the latter was not an isolated act. If any bank failed to report, the auditor was to levy one per cent. on the nominal capital of the bank; this assessment was to be presented to the bank by the sheriff, and if it was not paid at once, with four per cent. of the sum involved in addition for the sheriff's fee, he was authorized to levy on the specie and notes; if he could not find enough of these, he was to seize any other property of the bank, advertise, and sell it.<sup>10</sup>

In March, 1817, a branch office of the Bank of the United States was established in Cincinnati, and in the following October a second branch was organized at Chillicothe, although it apparently did not begin business until the spring of 1818.<sup>11</sup> This was done "without any enquiry whether such a measure would, or would not meet with the approbation of the constituted authorities of the state. At the time that this office was established it was in direct violation of the letter and spirit of a statute of Ohio, enacted before the Bank of the United States was incorporated."<sup>12</sup> While the establishment of the branch at Cincinnati seems not to have been opposed,<sup>13</sup> there did exist statutes which might have been invoked against it. Nine

<sup>8</sup> Act of January 27, 1816.

<sup>9</sup> Act of February 10, 1815.

<sup>10</sup> Cf. Act of February 8, 1819, taxing the branches of the Bank of the United States.

<sup>11</sup> *House Journal*, 1820-1821, p. 110.

<sup>12</sup> Rep. of Com. on Taxing the Bank, *ibid.*, 1819, p. 399.

<sup>13</sup> Cf. Minority Rep., *ibid.*, 1820-1821, p. 391. This report explained the opposition which developed against the Bank as the result of the jealousy of local bankers whose business was adversely affected. "A kind of village aristocracy was erected in almost every town [by the establishment of local banks]. . . . Prejudice, first excited by those who had been engaged in flooding the community with an unsound currency, at length became quite general."

months' experience with the Cincinnati branch seems to have persuaded the legislators that it was detrimental to the success of the local banks,<sup>14</sup> and that, as it was not paying any taxes while they were, it occupied a favored position. Accordingly, at the beginning of the next session, on December 13, 1817, Mr. McMillan moved the appointment of a joint committee to take into consideration the propriety and expediency of taxing the branches of the Bank of the United States, which then were or might hereafter be established in the state. This was agreed to.<sup>15</sup> The committee reported against the "expediency" of levying such a tax. The chief argument advanced by the committee was that the charter was a contract, and that the constitution of Ohio provided that "no law impairing the obligation of contracts shall ever be made". This report was reversed by the house of representatives, 37 to 22.<sup>16</sup>

A substitute for this report was then offered, January 19, 1818, asserting the right of the state to levy such a tax, and the expediency of doing it at that time. The constitutional right of the state to levy such a tax was carried, 48 to 12, and the expediency of proceeding to levy the tax now, by 33 to 27.<sup>17</sup> Among the arguments advanced in this substitute report chief reliance was placed, in asserting the constitutional right of the state to tax the branches, upon the fact that the charter of the Bank did not include exemption from taxation among the privileges claimed; that such immunity did not generally attach to incorporated companies, such as the Bank was; and that, inasmuch as the state banks had paid bonuses for their charters, any invasion of their charter privileges would be an impairment of the state's contract with them. On the question of expediency, the report concluded that "these branches must very seriously affect the operations of the state banks"; that "the capital introduced into the country through these branches, is directly calculated to wither our agriculture and cramp our manufactures"; and that they were "unquestionably a proper subject of taxation". To carry out the conclusion of the report a bill was introduced "to levy a tax on the capital of the subscribers to the Bank of the United States, employed in banking within this state". After it had been read a third time, on January 24, further consideration was postponed until the second Monday of the following December, by a

<sup>14</sup> By a preamble and resolutions adopted in the house of representatives on January 19, 1818, disapprobation of the establishment of a second office was expressed; "but the directors seem to have regarded this expression as deserving no consideration". *House Journal*, 1819, p. 400.

<sup>15</sup> *Ibid.*, 1817-1818, p. 90.

<sup>16</sup> *Ibid.*, pp. 144-146.

<sup>17</sup> *Ibid.*, pp. 307-315.

vote of 31 to 28.<sup>18</sup> In the meantime, the committee was instructed "to make certain enquiries concerning the effect produced by the establishment and management, of the branches of the Bank of the United States in Ohio, upon the paper currency of the state".<sup>19</sup>

During the summer of 1818 the committee sent out a circular letter for information to the state banks and to the branches of the Bank of the United States. The former answered, with few exceptions, but the latter treated the request for information with "contemptuous silence" without "even the forms of common politeness", though the president of the Cincinnati branch "verbally and officially" stated his willingness to give the desired information. Nineteen of the state banks reported and five failed to do so.<sup>20</sup> From the data furnished the following table was compiled for these nineteen state banks.<sup>21</sup>

From data in the auditor's office the committee were able to give the capital of the twenty-four banks in the state as \$2,268,000, the circulating notes as \$1,336,000, and the specie as \$450,000. The whole amount of their demand liabilities very little exceeded \$2,000,000, against which they held a specie reserve of about 20 per cent. Compared with the 12 per cent. held by the Philadelphia banks on November 4, 1816,<sup>22</sup> the Ohio banks were in a safe though not impregnable position. Some of the banks had, however, greatly overissued their notes and these institutions felt keenly the competition of the Bank of the United States.

The notes of the Bank were convertible in coin, were alike in character no matter by which branch they were issued, and were

<sup>18</sup> *House Journal*, 1817-1818, p. 360.

<sup>19</sup> *Ibid.*, 1819-1820, p. 393.

<sup>20</sup> "It is much to be regretted that a false pride or an unfounded jealousy should have prevented banks of undoubted solvency from making a report." Rep. of Com., *House Journal*, 1819-1820, p. 407.

<sup>21</sup> *Ibid.*, 1819-1820, p. 405.

DEBTS	FUNDS
Capital .....	\$1,668,688
Notes in circulation .....	1,136,177
Due individual depositors ...	227,774
Due Bank of United States..	694,848 <sup>22</sup>
Total .....	<hr/> \$3,727,487
	<hr/> \$3,821,425
Bills discounted .....	\$2,895,483
Specie .....	385,333
Ohio notes .....	121,936
Notes of other banks .....	135,551
Due from banks .....	221,718
Real estate .....	61,404

<sup>22</sup> Three of the banks did not report the debts due from them to the Bank of the United States, but the amount estimated by the committee has been included. Other reports were incomplete in various items, causing a discrepancy in the two sides of the balance-sheet of about \$100,000.

<sup>23</sup> Rep. of Com., *House Journal*, 1819-1820, p. 408.

pretty steadily maintained at par. Being equally good in all parts of the United States they were much sought after for making remittances. The notes of the local banks, on the other hand, depreciated greatly at any distance from the issuing bank, were often overissued in amount, and were not always redeemed in specie. It was the practice of the branches of the Bank to present the notes of the state banks, which accumulated in their hands in the ordinary course of business, for redemption about once a week. In such settlements the debtor bank must pay the balance in specie. This practice provided an automatic test of the solvency of the local banks, and forced them to keep down their note-issues to a reasonable proportion of their capital, but these very facts caused them to hate the agency by which such desirable reforms were effected.<sup>24</sup>

Whether the Bank of the United States acted towards the banks of Ohio "in a spirit of contempt and rancor" or not, the management of the Bank was such as to involve the western banks generally in difficulties. Under the loose administration of William Jones, the first president of the Bank, the capitals of the branch offices were not fixed and they were permitted to extend their discounts at pleasure, without any limitation in that respect. There was moreover no restriction as to note-issues, and they could therefore issue their paper without check. This they did and consequently piled up enormous loans. For instance, the Cincinnati branch is stated to have discounted over \$1,800,000 in June, 1818—an amount almost as great as the loans at Boston or New York.<sup>25</sup> By October 3, 1818, the total discounts of the two branches in Ohio amounted to \$2,494,000, although the whole banking capital of the state did not exceed \$2,300,000.<sup>26</sup> As a result of the loose management the Bank soon became almost bankrupt, and vigorous measures were taken by the directors to secure its solvency. Among other things they ordered the Cincinnati office to collect the balances due from the Cincinnati banks at the rate of 20 per cent. a month.<sup>27</sup> These balances amounted on July 1 to over \$700,000,<sup>28</sup> and by Oc-

<sup>24</sup> The Committee on Taxing the Bank in 1819 charged that the branches of the Bank of the United States had been established in Ohio without any capital, and that they had accumulated this by draining the local banks of their specie in the way described above. Moreover a large amount of local bank-notes had been paid to the government for public lands and had accumulated in the Treasury Department. "The directors of the Bank of the United States were soon apprised of the amount of Ohio paper, held by the government upon deposit, and they early made arrangements to convert it into a banking capital for themselves." *House Journal*, 1819, p. 400.

<sup>25</sup> R. C. H. Catterall, *The Second Bank of the United States*, p. 34.

<sup>26</sup> *House Journal*, 1819, p. 401.

<sup>27</sup> Order of July 20, 1818. Quoted by Catterall, p. 51.

<sup>28</sup> *Niles' Register*, September 19, 1818, XV. 59.

tober 3 had swelled to \$974,000,<sup>29</sup> a sum which the banks were quite unable to pay. As a result it was further directed by the orders of October 30, that no further credits be given to the Cincinnati banks until the balances already due were discharged. At the same time the Bank drew upon Cincinnati for \$50,000 and on Chillicothe for \$100,000 in specie.<sup>30</sup>

Intelligible as these transactions were from the standpoint of the Bank of the United States, which was striving desperately to strengthen and save itself from bankruptcy, in Ohio they were regarded as wilfully oppressive to the state banks. These latter endeavored to reduce their debts, but succeeded only in inflicting distress upon their debtors, who had neither specie nor notes with which to pay. The Cincinnati banks protested therefore against the action of the Bank of the United States as a "grievance unprecedented". The Bank could not afford to yield, however, and instead of granting more favorable terms, prohibited the receipt of the notes of these banks. This act brought about the suspension of the three Cincinnati banks within a month, in November, 1818.<sup>31</sup>

The attitude of the people of Ohio toward the branches of the Bank of the United States may be inferred from the platforms of the politicians in their appeals to the voters, for these are usually such as will approve themselves to the people. In the fall election of 1818, Col. John Sloane, a candidate for election to Congress from Wooster, Ohio, issued an address to the electors in which he announced himself strongly opposed to the Bank. "The power to create banks", he wrote, "not being granted [by the Constitution], the law establishing the United States' bank, is *unconstitutional*, and ought to be repealed."<sup>32</sup> A month later Niles printed a letter from a citizen of Ohio, urging a tax on the branches of the Bank of the United States as a means of protection to the state banks.<sup>33</sup> In his

<sup>29</sup> *House Journal*, 1819-1820, p. 406.

<sup>30</sup> Catterall, p. 53, n.

<sup>31</sup> Catterall, p. 63. It was stated by Niles in December that "2500 dollars, per week, are required to pay the *discounts* on monies loaned by the branch of the bank of the United States, at Cincinnati—the branch has scarcely any of its notes in circulation, and Ohio has been drained of specie. It is a serious question how these discounts are to be paid." "Many of those [the Ohio banks] that were considered as the best banks in the state, have stopped payment." *Niles' Register*, December 12, 1818, XV. 283.

<sup>32</sup> *Ibid.*, October 24, 1818, XV. 130.

<sup>33</sup> The reasoning by which the legality of such a tax is proved is interesting. The Ordinance of 1787 provided that no tax should be imposed upon lands the property of the United States; the existence of this provision showed that without it the states might have taxed these lands or other property of the United States not expressly exempted. They therefore had a right to tax capital invested in the stock of a bank chartered by the federal government unless a stipulation

message to the legislature at the opening of the session of 1818-1819, the governor discussed the banking situation at length, and referred as follows to the Bank of the United States:

Since the incorporation of the Bank of the United States, and since the passage of the present law of this state against unauthorized banking companies, that institution has established, without asking leave, two agencies . . . whose course of proceeding, the banks loudly complain, cramps the operations, and diminishes the profits of the latter, as well as impairs the state revenues arising from these sources. . . . But whether the branches remain among us, of right, or by permission, and while the state banks are subjected to the imposition of taxes, or an equivalent, there appears no evident reason why those branches should be exempt. Their exemption would be a partiality, unjust to the local banks.<sup>34</sup>

The house committee, finally, to whom the matter was referred at the previous session for report, recommended "the propriety of providing by law, that if the branches established within this state shall remain here and transact business, beyond a certain day, a tax shall be assessed and collected of \$50,000 annually upon each branch".<sup>35</sup> In accordance with this recommendation a bill was introduced into the legislature and was finally enacted into law on February 8, 1819. "Whereas the president and directors of the Bank of the United States have established two offices of discount and deposit in this State, at which they transact banking business, by loaning money and issuing bills, and by trading in notes and bills; and whereas it is just and necessary that such unlawful banking, while continued, should be subject to the payment of a tax for the support of government"—it was provided that if any of these associations continued in business after September 1 they should be taxed, the Bank of the United States \$50,000 per annum for each office, and every other company \$10,000. On September 15 of each year the auditor was to assess these taxes against the companies, and to make out his warrant to the agent whom he should appoint to collect the tax. In case of default, the agent was authorized to levy on the goods of the Bank or its credit; he could seize the specie or notes, searching the Bank for them. The officers of the Bank might be put to oath to disclose where the funds were, or they

to the contrary were made. As this had not been done in the case of the Bank of the United States, the right of the state to tax its branches was undoubted; and this was especially true because Ohio taxed her own banks, and if they were driven out of business by the Bank of the United States, the state would be deprived of a considerable revenue. *Niles' Register*, November 7, 1818, XV.

163-164.

<sup>34</sup> Governor's Message, *House Journal*, 1818-1819, pp. 92, 94.

<sup>35</sup> *Ibid.*, 1818-1819, p. 409.

might be summoned to court and examined, a refusal to answer constituting contempt. Debtors to the Bank must pay the state until the amount of the tax was reached. The sum collected was to be paid by the agent to the auditor and by him to the treasurer. The agent was to have, as his remuneration, two per cent. of the amount collected in specie or notes; five per cent. of goods taken in execution; and ten per cent., if further proceedings were required.

Similar taxes had already been laid on the Bank of the United States in five other states, namely, Maryland (\$15,000), Tennessee (\$50,000), Georgia (thirty-one and one-fourth cents on \$100 capital), North Carolina (\$5,000), and Kentucky (\$60,000), while the constitutions of Indiana in 1816 and of Illinois in 1818 prohibited the establishment of any but state banks within their boundaries. The subject was also debated in the legislatures of Virginia, South Carolina, and New York.<sup>36</sup>

As to their constitutional right to levy such a tax, the majority of the Ohio legislature seems not to have entertained any doubt.<sup>37</sup> For two years they had seen it asserted in other states. Niles, the determined opponent of the Bank, had urged such action upon the states and had asserted their constitutional right so to do.<sup>38</sup> Finally, the only case bearing upon this point seemed to justify this conclusion. This point was urged by an Ohio legislative committee two years later.

At the period of adopting these measures [they wrote], the constitutional right of the state to levy the tax was doubted by none but those interested in the bank. . . . During the existence of the old Bank of the United States, the state of Georgia had asserted this right of taxation, and actually collected the tax. The bank brought a suit, to recover back the money, in the federal circuit court of Georgia. This suit was brought before the supreme court upon a question not directly involving the power of taxation. The supreme court decided the point before them in favor of the bank, but upon such grounds that the suit was abandoned, and the tax submitted to.<sup>39</sup> When the charter of the present bank was enacted, it was known that the states claimed, and had practically

<sup>36</sup> See Catterall, pp. 64-65.

<sup>37</sup> "The state right to tax the institution was strongly asserted, and almost universally believed in by the people." Chase, *Statutes of Ohio*, I. 43.

<sup>38</sup> "The states should take it up; and tax the mother bank and the branches out of every resting place except the ten miles square." *Niles' Register*, February 28, 1818, XIV. 5.

<sup>39</sup> The committee evidently refer here to the case of the Bank of the United States *v.* Deveaux (5 Cranch, 61), which was decided in 1809. This case involved the question as to whether the circuit court, in a suit brought by the Bank, had jurisdiction. The Supreme Court, to which the suit was appealed, held that it did and remanded the case for further action. It does not appear from this decision that the bank took any other action to resist the payment of the tax, and there is no further indication in the federal cases of what was done in the matter.

asserted, the right, of taxing it, yet no exemption from the operation of the power is stipulated by Congress. The natural inference, from the silence of the charter upon this point, would seem to be, that the power of the states was recognized, and that Congress was not disposed to interfere with it.<sup>40</sup>

When the law taxing the Bank was passed in February by the Ohio legislature, its execution was postponed until the September following, in order that the Bank might have abundant time so to arrange its business as not to come within the provisions of the taxing law. By that time it was expected the Bank would have withdrawn from the state.

The year 1819 was marked by a crisis, the first in the United States. Its causes are stated by Dewey to have been "in part the inability of the manufacturing industries to recover a stable footing after the abnormal growth occasioned by the embargo and the war, and in part a spirit of speculation developed by the several years of rapid commercial expansion and bad banking".<sup>41</sup> In the latter the Bank of the United States was a not inconsiderable factor, and, while it did not cause the panic, it certainly precipitated it by its abrupt curtailment of credits. "The Bank was saved and the people were ruined", wrote Gouge.<sup>42</sup> In the West the distress was especially keen. Enormous loans had been made in that section, which had encouraged the spirit of speculation; much of the capital so borrowed had been recklessly managed and badly invested and could not now be repaid. Much had been loaned to farmers, who had mortgaged their farms and homes as security, and had pledged their future production and savings to repay these loans. It was usual to renew such notes from time to time, and when these debtors were now called upon to pay they were utterly unable to do so. In times of crisis such property is always unsalable, and in this case it had been greatly overvalued, and would not bring even the amount of the mortgage.

The Ohio banks made a noble effort to maintain specie payments, but with only partial success. Early in January, 1819, Niles wrote:

Two or three banks in Ohio still pay specie—but there are very few of their notes in circulation. This state is a prey to Jew-brokers and bank directors, more, perhaps, than any other. . . . To retire their notes from circulation and make a shew of solvency, it is said that some of

<sup>40</sup> "Report of the Joint Committee to whom was referred the report of the auditor relating to the tax collected from the Bank of the United States, December 12, 1820." *House Journal*, 1820–1821, p. 111.

<sup>41</sup> Dewey, *Financial History of the United States*, p. 166.

<sup>42</sup> W. M. Gouge, *The Curse of Paper-Money and Banking* (ed. Cobbett, London, 1833), p. 71.

the banks have given written obligations to the branches of the U. S. Bank, for very large amounts.<sup>43</sup>

Owing to the adverse balance of trade and the drain of specie from the western country by the Bank of the United States, it was difficult to keep sufficient specie in the state. "It is estimated", wrote Niles in June,<sup>44</sup> "that 800,000 dollars in specie have been drawn from Ohio within the last twelve months, for the bank of the United States." Nevertheless, in midsummer there were still eight specie-paying banks in the state.<sup>45</sup> Three weeks later the number was reduced still further.<sup>46</sup> For these troubles the Bank of the United States was held to be primarily responsible.<sup>47</sup>

There was owed to the Bank of the United States in Ohio and Kentucky on April 1, 1819, the sum of \$6,351,120, which was reduced less than \$1,000,000 three years later. The Bank consequently was compelled to foreclose its mortgages and realize upon them. "As a consequence of the transfer of real estate, the bank owned a large part of Cincinnati: hotels, coffee-houses, warehouses, stores, stables, iron foundries, residences, vacant lots."<sup>48</sup> Owing to the rapid appreciation in the value of property, the final losses to the Bank were very slight, amounting on August 30, 1822, to but \$94,156 in Cincinnati and \$25,579 in Chillicothe. The effect of this upon the former owners of these valuable properties may easily be imagined. There was moreover a general spirit of hostility to the Bank in the West, where it was regarded as an intruder, often against the constitution and statutes of a state, possessed of superior privileges, paying no taxes, and acting as mentor to the local banks.

In the meantime, while the feeling of hostility to the Bank was rising higher, the case of *McCulloch v. Maryland* was decided on

<sup>43</sup> *Niles' Register*, January 9, 1819, XV. 361.

<sup>44</sup> *Ibid.*, June 26, 1819, XVI. 298.

<sup>45</sup> *Ibid.*, August 14, 1819, XVI. 405. Eight specie-paying banks were reported a year later. *Ibid.*, May 20, 1820, XVIII. 224.

<sup>46</sup> "Of twenty-five banks in Ohio, the Western Herald informs us, there are at present but six or seven which redeem their paper with specie." *Ibid.*, August 28, 1819, XVI. 484.

<sup>47</sup> The governor put the situation very temperately and correctly in his message to the legislature in December, 1819: "Very little doubt appears to be entertained, that this pecuniary embarrassment has been hastened, by the operations of the Bank of the United States; but the leading cause, I suspect, will be more successfully sought, in the too expensive and injudicious use of their credit formerly made by some of the borrowers with hopes too sanguine to be realized in times like the present. These causes combined with an adverse balance of trade, and the fallen price of country produce, have conspired to prevent these institutions from redeeming their bills and preserving their credit, and circulation." *House Journal*, 1820, p. 10.

<sup>48</sup> Catterall, p. 67.

March 7, 1819, to the effect that the states were debarred by the federal Constitution from levying a tax upon a bank chartered by Congress.<sup>49</sup> The Ohio law, however, directing the auditor of the state to levy and collect the tax of \$50,000 on each branch of the Bank of the United States that should continue to transact business within the state after September 1, remained unrepealed. This law the auditor considered imperative on himself, in which opinion he was upheld by the governor, and he deemed it his duty under the law to execute its provisions, unless enjoined by proper authority.<sup>50</sup> The auditor was really placed in an embarrassing predicament, but held that as a state officer his first duty was to carry out the mandates of the state laws.<sup>51</sup> On September 11 he was served with a notice that application would be made to enjoin the proceedings under the tax law. On the morning of September 15 the auditor was further served with a copy of a petition in chancery, praying that he be enjoined from charging the bank with the proposed tax, and also with a subpoena from the same court to appear to answer the petition on the first Monday of the following January. As no one of these documents constituted an injunction upon his proceedings under the law, the auditor issued his warrant to John L. Harper, for the collection of the tax.

Before delivering this warrant, however, the auditor submitted the various papers to the secretary of state and asked him to secure legal advice as to whether they did operate as an injunction. In reply he received the written opinion of several lawyers "that it did not appear that there was any order of court allowing an injunction, or any suit of injunction, or indeed any document whereby the defendant can be charged with notice of the contents of the petition".<sup>52</sup> Accordingly he delivered the warrant to Harper with

<sup>49</sup> 4 Wheaton, 316. The text of the decision is given in full in *Niles' Register*, March 20, 1819, XVI. 68.

<sup>50</sup> Auditor's rep., December 9, 1819, in *House Journal*, 1820, p. 38.

<sup>51</sup> Most of the accounts of the taxation of the Bank of the United States by Ohio seem to proceed on the theory that the action of Ohio was brought about by, and followed, the handing down of the decision of the Supreme Court in *McCulloch v. Maryland*. Thus McMaster (*History*, IV. 498) says it "was immediately defied and set at naught by Ohio", and later (p. 504) speaks of the "condition of depression and desperation . . . in Ohio". Schouler (*History*, III. 119, 246) states that "the decision was bitterly repudiated by the State officials, . . . who had attempted to levy a tax in defiance of its mandate". The writer is convinced, on the other hand, by his study of the documents, that the people of Ohio had a very good case against the Bank, that they were convinced of the justice of their position, and that they proceeded to test their rights in constitutional, legal, and peaceful ways. It certainly is unnecessary to stigmatize the conduct of the state as "senseless warfare", as does Schouler (*History*, III. 246).

<sup>52</sup> *Ibid.*, p. 40. The accounts usually state that the auditor defied the injunction. Thus Hildreth (*History*, VI. 680) declares that "an injunction from the

instructions to proceed. The latter went to the branch at Chillicothe on September 17, and upon the cashier's refusal to pay the tax, jumped over the counter, "and with force and violence . . . did take from the said office money and notes to the amount of upwards of one hundred and twenty thousand dollars".<sup>53</sup> Five days later the amount in excess of \$100,000 was restored to the Bank. The money thus taken was paid into the Bank of Chillicothe after banking hours and kept there over night. The next day it was taken to Columbus, and \$98,000 was deposited in the Franklin Bank of that city to the credit of H. M. Curry, the treasurer of the state, the other \$2,000 being retained by Harper as his fee.

Meanwhile the injunction asked for had been served upon Osborn, the auditor, on September 18, in which he was directed not to collect the tax, nor pay it out if collected; he was also requested by the Bank to return the money collected. This he refused to do, as the matter had now passed out of his control.<sup>54</sup> Soon after this Harper and Orr, one of the latter's assistants, were arrested at the suit of the Bank in an action at law for the recovery of the money taken by them. Bail was required to double the amount of the money collected, and an action for habeas corpus having failed, they remained in prison until the following January, when they were released by the federal circuit court on the ground that the arrest was irregular.<sup>55</sup> On September 22 an injunction was granted by Judge C. W. Byrd, the United States district judge, restraining the auditor, the treasurer, and the depository bank from making any disposition of the moneys collected as a tax from the Bank.<sup>56</sup> In December Osborn made an elaborate report of all these proceedings to the legislature, which ordered five hundred copies of the report and accompanying documents printed for distribution.<sup>57</sup>

After collecting the tax from the branch at Chillicothe Harper went to Cincinnati, armed with a similar warrant from Osborn, but was assured that the Cincinnati branch had discontinued business and was maintaining an agency only for the purpose of redeeming its paper. Consequently no effort was made to execute the warrant and collect the tax at this place.

Circuit Court of the United States was disregarded", and even Sumner (*History of Banking in the United States*, p. 153), careful and accurate as he is in most respects, errs in stating that an injunction was served on the auditor before the collection of the tax.

<sup>53</sup> Petition of the Bank of the United States, etc., in *House Journal*, 1820-1821, p. 53. The exact sum taken was \$120,425, of which \$7,930 was a treasury deposit belonging to the United States.

<sup>54</sup> Aud. rep., *House Journal*, 1820, p. 41.

<sup>55</sup> For an account of the irregularity in their arrest, see McMaster, IV. 499.

<sup>56</sup> *House Journal*, 1819-1820, p. 61.

<sup>57</sup> *Ibid.*, 1820-1821, p. 38-44.

On November 23, 1819, John Marshall, chief justice, granted an injunction against Osborn, Curry, and others, restraining them from making any disposition of the moneys collected as a tax from the Bank of the United States. The following January<sup>58</sup> application was made in the federal circuit court for an attachment against Osborn and Harper for contempt in disobeying the injunction of the previous September; but after argument the court decided to hold the case under advisement until the following September, on account of the important constitutional questions involved. During the interval a new state treasurer, Sullivan, succeeded Curry. When the case finally came up for trial in September, 1821, the latter in his answer stated that he had received \$98,000 from Harper, which he had held separate and unused, and had delivered to his successor. By an arrangement of the counsel of both parties a decree was entered, ordering Sullivan to restore the amount of the tax together with interest on \$19,830,<sup>59</sup> but providing that the interest, the \$2,000 withheld by Harper as his fee, and the costs be appealed for final decision to the Supreme Court of the United States. A perpetual injunction was also granted against the collection of any tax in future under the tax law of Ohio.

Sullivan contended that he could pay out funds in the treasury only upon the warrant of the auditor, but as no appropriation act had been passed for that purpose the auditor had no legal or constitutional authority to draw upon the treasury. Consequently he refused to obey the decree. The court placed him in custody of the marshal, and issued a writ of sequestration against all his property. Acting under this authority the commissioners named in the writ took from him the keys of the treasury, and entering the vault recovered the \$98,000 originally seized by Harper as the tax.<sup>60</sup> This was taken into court, and there delivered to the agents of the Bank. An appeal was taken, but it was agreed that the appeal should operate on the \$2,000 yet lacking. Not until 1824 did the Supreme Court finally hand down its decision.

Let us now return from this account of court proceedings to the attitude of the people and the legislature. We have seen the effects of the crisis of 1819 upon the local banks and the people of Ohio, and the part which the Bank of the United States played in the

<sup>58</sup> January 5, 1820.

<sup>59</sup> Of the \$100,000 taken, this amount was in specie, and \$80,170 was in bank-notes. *Aud. rep., House Journal*, 1820, p. 41.

<sup>60</sup> *Treas. rep., ibid.*, 1821-1822, p. 49. It does not appear that in these actions there was any intention to resist the orders of the court, but rather to insist upon the technical correctness of each step. The state officials were after all bound by state laws, and were justified in construing their meaning strictly.

financial troubles of this period. The results of the crisis and resulting depression were widespread throughout the entire Mississippi Valley. In most of the states, as Tennessee, Kentucky, Illinois, Missouri, etc., relief and stay laws were passed for the benefit of debtors. Ohio, on the other hand, enacted stringent laws in 1819 and 1820 to compel banks to meet their obligations, though they were not effective in maintaining specie payments on the part of all the banks.<sup>61</sup> And this was done during a period when the falling prices made it additionally difficult for the farmers of Ohio to market their produce at a remunerative price. In the autumn elections of 1819 the taxation of the Bank was the most important issue, and at this time the opponents of the Bank were generally victorious; in one case a candidate received 1591 votes to 369 for his opponent (pro-Bank); in another, 1350 to 640, etc.<sup>62</sup> The legislature of 1819-1820, however, took no further legislative action, as the matter was before the courts and wholly unsettled during the period of its session.

The legislature of 1820-1821 was all but unanimous against the Bank, and early in the session adopted a report giving utterance to

<sup>61</sup> Some of the banks went out of business, the capital of the state banks declining from \$2,003,969 in 1817 to \$1,697,463 in 1819 (*Niles' Register*, March 25, 1820, XVIII. 77-78). In the latter year the circulation amounted to \$1,203,869, the public deposits to \$191,454, and the private deposits to \$263,000; against these liabilities they held specie to the amount of \$433,612, or 26 per cent., which represented a stronger position than that of 1818 (*supra*, p. 316). But the reserve was not equally distributed; eight of the banks succeeded in maintaining specie payments even through the crisis, but the notes of the rest were in varied stages of depreciation. This is well illustrated by the character of the funds held by the state treasury. A committee appointed "to enquire into the state of the funds in the treasury" reported (*House Journal*, 1820, p. 307) that \$141,336 consisted of bank-notes, of which \$78,180 were those issued by the Bank of the United States, \$21,210 of specie, and the balance, or \$51,850, of credits in banks, paper representing loans, and redeemed auditor's bills. "The nature of a part of the funds in the treasury", wrote the governor a year later (*House Journal*, 1821, p. 13), "has caused some difficulty, in transacting the business of that department. . . . There seems, however, reason to hope, that the greater part of these notes can be realized, at no very distant period. . . . Some of the banks, in doubtful credit at the last session of the legislature, are said to be engaged in closing their concerns; and a depreciated currency appears at this time, to be confined to a small portion of the state; but considerable distress is generally experienced, from the deficiency of a good medium of exchange. . . . [There is] danger of depreciation, so long as the debts contracted to the eastern merchants, to the Bank of the United States, and at the land offices (debts equally required to be drawn from the state) shall remain to any considerable extent unsatisfied; and money rather than security will probably continue to be required in negotiations, till the payment shall be nearly completed—a consummation which the extremely low price on our produce and the heavy charge on its transportation, delay and render difficult."

<sup>62</sup> *Niles' Register*, October 30, 1819, XVII. 139.

high state-rights doctrines. This is referred to by several writers as evidence of strong hostility to the centralizing tendency of the federal government and of a reaction towards state sovereignty.<sup>63</sup> It must be clear, however, that the legislature and people of Ohio were actuated in their attitude towards the Bank by no political theories, but rather by an economic situation. In so far as appeal was made to theories of government, it was merely to find constitutional justification for economic motives by which they were guided. That Ohio was not hostile to federal action even within the state limits, is seen by her request to Congress to assist in building her canals, made during the very period when the Bank case was being disputed; by her approval of the Cumberland Road; by her position on the tariff, all the votes of Ohio congressmen being cast in favor of protection in both 1816 and 1824; and by her attitude towards the disposition and taxation of the public lands. In all these cases her position was determined by the economic advantages to be obtained, and not by any *a priori* theories of political relations.

On December 12, 1820, the report just mentioned was made by a joint committee of the legislature, "to whom was referred the report of the auditor<sup>64</sup> relating to the tax collected from the Bank of the United States".<sup>65</sup> Owing to its importance a brief statement of the main arguments may be presented. After reviewing the transactions of the Bank and the passage of the tax law, with the resulting suits, the committee hold that though the state auditor and treasurer were made defendants in suits brought by the Bank, it was in their official capacity as agents of the state. But, according to the Eleventh Amendment, a state cannot be sued, hence the suits had no standing, especially in a *circuit* court.<sup>66</sup> The committee declare that they are aware of the doctrine that the federal courts are exclusively vested with jurisdiction to declare, in the last resort,

<sup>63</sup> E. g., Ames, *State Documents on Federal Relations*, no. III., p. 5; Turner, *Rise of the New West*, p. 300, which follows the account of Ames.

<sup>64</sup> See *supra*, p. 324.

<sup>65</sup> *House Journal*, 1820-1821, pp. 98-132. The text of the report and seven resolutions is also given in *Senate Documents*, 16 Cong., 2 sess., no. 72; in *Executive Documents*, VI., no. 88; in *Annals of Congress*, 16 Cong., 2 sess., pp. 1686-1714; and in *American State Papers, Misc.*, II. 643-654. Extracts from the reports, with the first seven resolutions, are printed in Ames, *State Documents on Federal Relations*, no. III., pp. 6-13. The resolutions alone are given in Niles, XIX. 339-341. In all these, however, the first seven resolutions only are given, the eighth and last being omitted. The *House Journal* gives eight, as described below. King (*Ohio*, 337) states that the report was drawn up by Charles Hammond, the counsel of the state in the Bank proceedings.

<sup>66</sup> Apparently the fact that the restraining injunction had been granted by the *circuit* court rankled more than the decision of *McCulloch v. Maryland*.

the true interpretation of the Constitution of the United States, but "to this doctrine, in the latitude contended for, they can never give their assent". The committee quote with approval the Kentucky and Virginia Resolutions, which they maintain that the states and people recognized in the elections of 1800.

The committee then take up for examination and review the "case of Maryland and M'Colloch". "And upon the promulgation of this decision it is maintained that it became the duty of the state and its officers to acquiesce, and treat the act of the legislature as a dead letter. The committee have considered this position, and are not satisfied that it is a correct one." They examine at great length the reasoning in *McCulloch v. Maryland* and criticize it adversely. The power of Congress to *charter* a bank is admitted, but the claim is made that such a bank is a *private* corporation, not a means of government, and hence its business may be controlled by the states. The conclusion is finally reached after a lengthy refutation, that "a power in the states to tax, or even to prohibit a trade in bills of exchange and gold and silver bullion, is not a power to destroy the corporate franchises of the Bank of the United States. . . . The power to tax their trade, is not a power to destroy the corporation." In the opinion of the committee the Bank of the United States is a mere private corporation of trade, and as such its trade and business must be subject to the taxing power of the state. In reply to the argument that the tax is excessive in amount and therefore unjust, the committee urge that it was levied as a penalty, and it was not supposed the Bank would venture to incur it, but would withdraw its branches.

However, the committee recommend a compromise: if the Bank will discontinue the suits, and withdraw the branches from the state, the amount of the tax shall be refunded. But they urge that the general assembly do not stop here. The reputation of the state has been assailed throughout the United States, and the nature of the controversy, and her true course of conduct have been very much misunderstood. The general assembly should therefore take measures to vindicate the character of the state, and also for awakening the attention of the separate states to the consequences that may result from the doctrines of the federal courts. And as the compromise may not be accepted, they should assert and maintain the rights of the state, by all constitutional means within their power.

Since the exemptions claimed by the bank are sustained upon the proposition that the power that created it must have the power to preserve it, there would seem to be a strict propriety in putting the creating

power to the exercise of this preserving power, and thus ascertaining distinctly whether the executive and legislative departments of the government of the Union, will recognize, sustain, and enforce the doctrine of the judicial department.

[For this purpose the committee recommend the outlawry of the Bank and the withdrawal from it of legal processes and remedies.]

The adoption of these measures will leave the bank exclusively, to the protection of the federal government, and its constitutional power to preserve it in the sense maintained by the supreme court may thus be fairly, peaceably, and constitutionally tested.

The committee conclude by recommending the adoption of eight resolutions: (1) an affirmation of the Kentucky and Virginia Resolutions (passed 59 to 7); (2) a protest against the actions of the circuit court (59 to 7); (3) assertion of the right to tax any private corporation of trade incorporated by Congress and located within a state (unanimous); (4) assertion that the Bank of the United States is a private corporation of trade, the capital and business of which may be legally taxed in any state where they may be found (unanimous); (5) protest against the doctrine that the political rights of states may be settled in the Supreme Court, in cases contrived between individuals (64 to 1); (6) the report and resolutions to be transmitted to other states for their opinion (unanimous); (7) also to the President and Congress (unanimous); (8) that bills be prepared and brought in, to carry out the recommendations of the report. The following day the house ordered 1,000 copies of the report and accompanying documents printed and bound in pamphlet form;<sup>67</sup> at the same time the senate also ordered 650 copies for its use.<sup>68</sup>

Six members of the minority in the house subsequently drew up a report protesting against this report.<sup>69</sup> They contended that the constitutional right of Congress to establish the Bank of the United States was "absolutely at rest". They protested against the view that the suits were contrary to the Eleventh Amendment. And finally they held that the tax of \$100,000 was unjust, as shown by the desire of the legislature to compromise.

In pursuance of the recommendations of the majority report, two acts were passed by the legislature, threatening reprisals on the one hand and suggesting concessions on the other. The first of these was "an act to withdraw from the Bank of the United States the protection and aid of the laws of this state, in certain cases".<sup>70</sup>

<sup>67</sup> *House Journal*, 1820-1821, p. 134.

<sup>68</sup> *Senate Journal*, 1820-1821, p. 119.

<sup>69</sup> February 2, 1821. *House Journal*, 1820-1821, pp. 386-393.

<sup>70</sup> Act of January 29, 1821. Chase, II. 1185. The house passed this act by a vote of 47 to 11. *House Journal*, 1820-1821, p. 324.

Sheriffs and jailers shall not, after September 1 next, take into custody persons arrested at the suit of the Bank. Officers of justice shall not receive acknowledgments for the Bank. Notaries public shall not make protest of notes payable to the Bank. Heavy penalties were provided for violating the law. The last section of the act provided, however, for the suspension of these provisions under certain conditions. If the Bank would discontinue its suits against the state officers, and would in future submit to an annual tax of 4 per cent. on the dividends of its business in Ohio;<sup>71</sup> or if it would withdraw its branches, then the act should be suspended.

Four days later a second act was passed setting forth still more explicitly the terms upon which the state was willing to compromise.<sup>72</sup> The legislature stated its willingness to refund the excess of the tax over 4 per cent. on the dividends. Whenever the Bank will withdraw its suits against the state officers and will submit to the payment of a tax equal to 4 per cent. on its dividends, or if the Bank will withdraw its branches from the state, \$90,000 will be refunded to it. And in future a tax of \$2,500 shall be collected annually as a tax, or else 4 per cent. on the dividends. No attention was paid to these proposals by the Bank, and the act of outlawry accordingly went into effect the following September. It does not seem to have been observed, however, but remained a dead letter on the statute books until it was finally repealed five years later, on January 18, 1826.<sup>73</sup>

No further legislation was enacted relative to the Bank of the United States. In 1822 a resolution to repeal the law levying the tax on the branches of the Bank of the United States was rejected in the senate, 27 to 6.<sup>74</sup> By this time the bad effects of the crisis of 1819 had largely passed away, the necessary liquidation had taken place, and prices were rising again. The attention of the people and the legislature was moreover being absorbed by other topics of even greater interest, namely, schools and canals. When the case of *Osborn v. the Bank of the United States* came up on appeal before the Supreme Court at the February term, 1824, there was no excitement. The decree of the circuit court was affirmed, except that interest should not be paid on the coin part of the money taken.<sup>75</sup>

<sup>71</sup> This was the rate of taxation on Ohio banks.

<sup>72</sup> Act of February 2, 1821. Chase, II. 1198.

<sup>73</sup> *Ohio Laws*, ch. 675, § 1.

<sup>74</sup> *Niles' Register*, January 5, 1822, XXI. 303.

<sup>75</sup> March 19, 1824. 9 Wheaton, 739.

As soon as the decision was announced Ohio acquiesced fully, and made no further effort to contest the point at issue.<sup>76</sup>

Throughout these proceedings [wrote Salmon P. Chase, then a young lawyer in Cincinnati] the state and her officers manifested the utmost respect for the constitutional tribunals of the country. They believed, conscientiously, that the state possessed the right to tax the bank, and measures were taken for the exercise and enforcement of that right. But in no instance was any indignity offered to any judicial tribunal, nor was resistance, in any case, opposed to judicial process. The state was true to the principles which had characterized her former course; and when the supreme court decided against her, she exhibited an example of dignified and unconstrained submission to the judgment of that high arbiter.<sup>77</sup>

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<sup>76</sup> It is not clear what is meant by the allegation in Turner, *Rise of the New West*, p. 300, to the effect that Ohio "even persisted in her resistance after the decision (*Osborn vs. Bank of the U. S.*, 1824) against the state". I have not been able to find any warrant for this statement.

<sup>77</sup> Chase's *Statutes of Ohio*, I. 43.